Supreme Court, U.S.
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No. 97-31

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, California State Prison at San Quentin; DANIEL E. LUNGREN, Attorney General of the State of California, *Petitioner*,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, *Respondent*,

PATRICK BRUCE GORDON, *Real Party in Interest.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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28 pp

CAPITAL CASE

QUESTIONS PRESENTED

Do 21 U.S.C section 848 and *McFarland v. Scott* create a separate "post conviction proceeding" that survives the dismissal of a petition for writ of habeas corpus containing unexhausted claims?

TABLE OF CONTENTS

Page

THIS COURT'S SUPERVISORY POWER REQUIRES REVIEW OF THE NINTH CIRCUIT'S AND DISTRICT COURT'S HOLDINGS THAT 21 U.S.C. SECTION 848 VESTS JURISDICTION IN THE FEDERAL COURT EVEN AFTER THE DISMISSAL OF A MIXED PETITION UNDER *ROSE V. LUNDY* 1

CONCLUSION 10

TABLE OF AUTHORITIES

	Page
Cases	
Arizonans for Official English v. Arizona ___ U.S. ___, 117 S. Ct. 1055 (1997)	8
Armster v. United States Dist. Court 806 F. 2d 1347 (9th Cir. 1986)	4-6
Brown v. Vasquez 952 F.2d 1164 (9th Cir. 1991)	2
Calderon v. District Court (Gordon) 107 F. 3d 756 (9th Cir. 1997)	2, 4
Christy v. Horn 115 F. 3d 201 (3rd Cir. 1997)	6, 7, 9
Coleman v. Vasquez 771 F. Supp. 300 (N.D. Cal. 1991)	9
County of Los Angeles v. Davis 440 U.S. 625 (1979)	5
Deakins v. Monaghan 484 U.S. 193 (1988)	7
Firefighters v. Stotts 467 U.S. 561 (1984)	5
Gordon v. Vasquez 859 F. Supp. 413 (E.D. Cal. 1994)	1, 3, 6, 8

TABLE OF AUTHORITIES, CONT'D

Hill v. Lockhart
992 F. 2d 801 (8th Cir. 1993) 9

In re Blodgett
502 U.S. 236 (1992) 5, 7

In re Cement Antitrust Litig.
688 F. 2d 1297 (9th Cir. 1982) 5, 6

In re Clark
21 Cal. Rptr. 509 (1993) 3

In re Joiner
58 F. 3d 143 (5th Cir. 1995) 9

In re Lindsey
875 F. 2d 1502 (11th Cir. 1989) 8, 9

In re Parker
49 F. 3d 204 (6th Cir. 1995) 3, 8

In re Virginia Electric & Power Co.
539 F. 2d 357 (4th Cir. 1976) 5

Johnson v. Texas
878 F. 2d 904 (5th Cir. 1989) 7

La Buy v. Howes Leather Co.
352 U.S. 249 (1957) 6

McFarland v. Scott
512 U.S. 849 (1994) 2-4, 7-9

TABLE OF AUTHORITIES, CONT'D

McKinney v. Paskett
753 F. Supp. 861, 865 (D.Id. 1990) 9

Rose v. Lundy
455 U.S. 509 (1982) 4

Schlagenhauf v. Holder
379 U.S. 104 (1965) 6

Shaw v. Delo
971 F.2d 181 (8th Cir. 1992) 8

Steffen v. Tate
39 F. 3d 622 (6th Cir. 1994) 3, 8

Sterling v. Scott
57 F. 3d 451 (5th Cir. 1995) 7, 8

Turner v. Johnson
106 F. 3d 1178 (5th Cir. 1997) 3, 8

United States ex rel. Whitehead v. Page
914 F. Supp. 1541 (Ill. 1995) 9

United States v. W.T. Grant Co.
345 U.S. 629 (1953) 5

Victor v. Hopkins
90 F. 3d 276 (8th Cir. 1996) 9

Vitek v. Jones
445 U.S. 480 (1980) 5

TABLE OF AUTHORITIES, CONT'D

Wainwright v. Norris
836 F. Supp. 619 (E.D. Ark. 1993) 9

Statutes

21 U.S.C.
§ 848 1-9

28 U.S.C.
§ 1651 5
§ 1983 7
§ 2254 1

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No. 97-31

ARTHUR CALDERON, Warden, California State Prison at San Quentin; DANIEL E. LUNGREN, Attorney General of the State of California, *Petitioner*,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, *Respondent*.

THIS COURT'S SUPERVISORY POWER REQUIRES REVIEW OF THE NINTH CIRCUIT'S AND DISTRICT COURT'S HOLDINGS THAT 21 U.S.C. SECTION 848 VESTS JURISDICTION IN THE FEDERAL COURT EVEN AFTER THE DISMISSAL OF A MIXED PETITION UNDER *ROSE V. LUNDY*

The question presented in this case is whether the "post-conviction proceeding" commenced under 28 U.S.C. section 2254 by a pre-petition request for appointment of counsel under 21 U.S.C. section 848 [hereinafter "section 848"] continues once the habeas corpus petition is filed and even after the petition has been dismissed for failure to exhaust. This was the essential holding of the district court in *Gordon v. Vasquez*, 859 F. Supp. 413, 416-421 (E.D. Cal. 1994) (Petn. App. C

at pp.14-30) and of the Ninth Circuit in *Calderon v. District Court (Gordon)*, 107 F. 3d 756, 761-762 (9th Cir. 1997) (App. A at pp. 12-13). Real party in interest Gordon does not deny that the creation of a separate proceeding in which the federal district court maintains jurisdiction over the case even though the parties are conducting collateral, competency, and clemency proceedings in state forums raises issues relating to the administration of the courts.[1/]

Gordon argues that the case is moot because of a procedural maneuver by the district court which occurred after the State commenced mandamus proceedings in the Ninth Circuit. As explained in the petition filed with this Court, the district court held that it had jurisdiction to grant a section 848 fees request even though proceedings were stayed so that Gordon could litigate unexhausted claims. The State initiated mandamus proceedings. The district court tried to moot the mandamus proceedings by vacating its stay of the federal proceedings, "striking" the 80-claim petition, and permitting Gordon to seek investigative funds. To evade the mandamus proceedings, the district court turned the clock back in Gordon's case by almost two years to the time before he filed his 80-claim petition. The district court used the pretext that this Court's decision in *McFarland v. Scott*, 512 U.S. 849 (1994) now permitted investigation and development of unexhausted claims. App. D at pp. 7-10. However, *McFarland* was not a "new"

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1. The State concedes the grammatical error in the question presented (Opp. at p. 1.). Gordon incorrectly claims that the State's Statement of the Case was misleading. Not so. Gordon did file what has been stylized as a "skeletal petition for habeas corpus." However, the pleading was in no way a true "petition." *McFarland v. Scott*, 512 U.S. 849 (1994); *Brown v. Vasquez*, 952 F.2d 1164, 1166, fn. 7 (9th Cir. 1991). The State did note that Gordon's initial request for investigative funds was denied on the ground that the request related only to unexhausted claims. Petn. at p. 10.

case and had been available as a reason for this new decision even prior to the district court's earlier decision to entertain a section 848 request when Gordon had been sent back to state court. The district court indicated that it believed that its new decision would have the effect of mooting the State's mandamus proceedings. See App. G at p. 4 attached to this Reply. The district court's belated order did not repudiate or abandon its prior published opinion in *Gordon v. Vasquez*.[2]

The Ninth Circuit ultimately denied the petition on the grounds of mootness because of the district court's maneuver of "dismissing" the mixed petition. However, the Ninth Circuit left intact the district court's published opinion holding that section 848 permitted a district court to grant investigative fees requests even while exhaustion proceedings were pending in state court and to also appoint lawyers for state collateral, competency, and clemency proceedings.[3] Furthermore, the Ninth Circuit's

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2. *McFarland* is readily distinguishable from this case. First, the record shows Gordon was represented by state counsel, the California Public Defender, on direct review. Contrary to Gordon's assertion, his state attorney had the opportunity to file a state habeas petition. Attached to this reply as App. F is Exhibit XXIV of the "Amended Petition and/or Supplemental Pleading to Petition for Writ of Mandamus and/or Prohibition Filed September 19, 1994 and Request for Stay of Order" filed with the Ninth Circuit in this matter. That exhibit is a declaration by Gordon's state attorney, dated March 12, 1990, indicating that he had reviewed the record in preparation for oral argument "and for filing a petition for writ of habeas corpus...." App. F at p. 2. A year before, the California Supreme Court had promulgated policies for the investigation and filing of habeas corpus petitions by state appellate counsel. *In re Clark*, 21 Cal. Rptr. 509, 520, 542, 550-551 (1993). Thus, unlike the unrepresented petitioner in *McFarland*, Gordon has always been represented for purposes of state collateral review. *Steffen v. Tate*, 39 F. 3d 622, 627-629 (6th Cir. 1994); *In re Parker*, 49 F. 3d 204, 209 (6th Cir. 1995); *Turner v. Johnson*, 106 F. 3d 1178, 1183, fn. 8 (5th Cir. 1997). Second, Gordon's federally appointed counsel had already been appointed and had filed a petition in federal court with 80 claims.

3. The district court held that it had authority under section 848 to

opinion held that a district court may still entertain fees requests under 21 U.S.C. section 848 even after a petition has been dismissed for failure to exhaust.

> "[W]e are not required to order *sua sponte* that the district court must deny the section 848(q)(9) fees request simply because we uphold the district court's dismissal of the mixed petition without prejudice. Under *McFarland* [citation omitted] the district court may consider a section 848(q) fees request even when a habeas petition is not presently pending before the federal courts." *Calderon*, 107 F. 3d. at 761; App. A at 12-13.

The State submits that both the district court and the Ninth Circuit wrongly interpreted section 848 and *McFarland*. The district court's evasion of its earlier published opinion was no more than the voluntary cessation of conduct that violated this Court's decision in *Rose v. Lundy*, 455 U.S. 509 (1982) requiring the dismissal of mixed petitions. Given the district court's and the Ninth Circuit's opinions, there is reasonable assurance that the violation will recur.

> "A change of activity by a defendant under the threat of judicial scrutiny is insufficient to negate the existence of an otherwise ripe case or controversy." *Armster v. United States Dist. Court*, 806 F. 2d 1347, 1357 (9th Cir. 1986).

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entertain a fees request because it had merely stayed petition proceedings for purpose of exhaustion. The Ninth Circuit held that the petition should have been dismissed, but otherwise agreed with the district court that it had jurisdiction under section 848 even after the dismissal of a mixed habeas petition.

The Ninth Circuit affirmed the district court's opinion that it had jurisdiction to grant section 848 fee requests even after a mixed petition had been dismissed. It left in force the district court's opinion that it could grant fee requests even after Gordon had returned to state court to commence exhaustion proceedings. Buttressed by the Ninth Circuit's opinion, the district court's opinion remains undisturbed. Gordon does not indicate that the district court's opinion was wrong.

The district court's tactical retreat cannot defeat the broader public interest in this Court giving guidance to all district courts. It is not "absolutely clear" that the wrongful behavior cannot reasonably be expected to recur. Gordon has failed to carry his heavy burden of showing mootness. *Firefighters v. Stotts*, 467 U.S. 561, 569-570 (1984); *Vitek v. Jones*, 445 U.S. 480, 487 (1980); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-633 (1953); *Armster*, 806 F. 2d at 1357-1361 (concerning guidance function of supervisory and advisory mandamus); *see also*, *In re Blodgett*, 502 U.S. 236, 240 (1992) (declining to issue writ, but articulating explicit judicial duties in litigation of capital cases); cf. *County of Los Angeles v. Davis*, 440 U.S. 625,631-633 (1979).

Gordon tries muddying the waters by raising a brand new argument--that the State should have challenged the district court's order by interlocutory appeal rather than petition by writ of mandamus. He did not raise this objection below. Furthermore, the Ninth Circuit Court of Appeals explicitly found that it had jurisdiction under 28 U.S.C. section 1651 due to its supervisorial powers to guide the district court on important questions of law relating to the orderly and efficient administration of the district courts. App. A at p. 7 citing *In re Cement Antitrust Litig.*, 688 F. 2d 1297, 1307 (9th Cir. 1982); *see also*, *In re Virginia Electric & Power Co.*, 539 F. 2d 357, 365 (4th Cir. 1976) (both interlocutory appeal and mandamus will lie when question

relates to appellate supervisory power). A holding that a dismissal of a mixed petition did not dismiss the federal action initiated by the preapplication request for appointment of counsel under section 848 had implications for the operation and administration of the courts throughout the Ninth Circuit. *In re Cement Antitrust Litig.*, at 1303-1304. Since the interpretation was a pure legal question, it could be reviewed for purposes of determining whether there was a clear and indisputable right to relief. *Id.* at 1305, fn. 5.

Supervisory control by mandamus is appropriately exercised when there is a clear abuse of discretion or a usurpation of judicial power. *Schlagenhauf v. Holder*, 379 U.S. 104, 109-111 (1965); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 257, 260 (1957). Furthermore, the Ninth Circuit was actually construing the validity and reach of a local rule of court that had been adopted as a "model" for district courts throughout the entire Ninth Circuit. *Gordon*, 859 F. Supp. at 417, fn. 7, 420, fn. 15; Petn. App. C at 14 fn. 7; *La Buy*, at 256-258; *Schlagenhauf*, at 112. Since this was an issue of first impression in the Ninth Circuit and since the district court had issued an opinion that was either contrary to or inconsistent with all other authority, review by mandamus was appropriate. The petition presented a substantial allegation of usurpation of judicial power. *Schlagenhauf*, at 110-111 (maj. opn.), 128 (Harlan, J. dis.). Whether denominated supervisory or advisory mandamus, review by writ was appropriate to provide guidance to all district courts. *Armster v. United States District Court*, 806 F. 2d 1347, 1352-1361 (9th Cir. 1986).

Gordon's argument as to the propriety of interlocutory appeal supports the State's argument in this case. Gordon argues that when the district court stayed proceedings rather than dismissing his mixed petition, that an interlocutory appeal was appropriate. He cites *Christy v. Horn*, 115 F. 3d 201, 203 (3rd Cir. 1997) (habeas corpus

proceeding) and *Johnson v. Texas*, 878 F. 2d 904 (5th Cir. 1989) (28 U.S.C. section 1983 civil rights action) as authorities for his argument. In both of those cases, the issue was whether the district court had the power to hold a proceeding in abeyance and also, in the *Christy* case, stay an execution while state court exhaustion proceedings were litigated. As *Johnson* explained, the litigant was left with no recourse but to proceed to exhaust state remedies without further recourse to the district court before those remedies were exhausted. *Johnson*, 878 F. 2d at 906. Thus, appeal was appropriate.

Neither *Christy* nor *Johnson* involved the novel two-tiered "post conviction proceeding" presented in this case. Although the district court stayed proceedings on Gordon's habeas corpus petition for purposes of exhaustion, it did not stay or dismiss what it identified as an ongoing, separate "post conviction proceeding" initiated by Gordon's request for appointment of counsel under 21 U.S.C. section 848 and *McFarland*. The district court indicated it would continue to exercise jurisdiction and intrude into ongoing state court processes by entertaining fee requests under section 848. The district court also explained that it interpreted section 848 as permitting appointment of counsel in state court competency and clemency proceedings. Thus, unlike the litigants in *Christy* and *Johnson* in his opposition, Gordon was left with a recourse to a "hover[ing]" district court "whenever [he] concluded that the things [in state court or state executive clemency proceedings] were proceeding unsatisfactorily...." *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988). The "Gordon proceeding" poses the very real risk of federal interference with state court and executive processes. *Sterling v. Scott*, 57 F. 3d 451, 457 (5th Cir. 1995).[4]

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4. Thus, the State has standing the chalenge the interpretation of section 848. Compare, *Blodgett*, 502 U.S. at 239-240. The State has shown a concrete and particularized, actual or imminent invasion of a legally protected interest.

No other court, including this Court, has intimated or assumed that such a "dual proceeding" exists. No other court has flung open the "narrow window" created by *McFarland*. *In re Parker*, 49 F. 3d 204, 210-213 (6th Cir. 1995) (*McFarland* is not available for every Death Row inmate since it "slightly expand[ed] federal jurisdiction" to stay executions for unrepresented petitioners who are entitled to appointment of counsel for preparation of a habeas corpus petition); *see also*, *Steffen v. Tate*, 39 F. 3d 622, 628 (6th Cir. 1994) (*McFarland* did not create a generalized repeal of the requirement that a habeas petition must be pending for a federal court to stay an execution, but only applied to limited situation where a truly unrepresented prisoner requires a lawyer to prepare a petition).

Contrary to Gordon's assertion, *Turner v. Johnson*, 106 F. 3d 1178, 1182-1183 & fn. 8 (5th Cir. 1997) specifically held that *McFarland* concerned only the period of time between the appointment of counsel and filing of the initial petition. Once a "comprehensive petition" has been filed, "*McFarland* has no application."

Similarly, in *Sterling v. Scott,* 57 F. 3d 451 (5th Cir. 1995) the court held that section 848 did not entitle a petitioner to "use the federal district court merely as a jurisdictional parking lot so that he may somehow attach a right to federally paid counsel to a non-cognizable pleading." *Id.* at 454. An appointment of counsel in federal court did not survive the dismissal of a mixed petition. *Id.* at 458; *see also*, *In re Lindsey*, 875 F. 2d 1502, 1506 (11th Cir. 1989) (section 848 does not encompass state court collateral, competency, or clemency proceedings occurring subsequent to initiation of federal proceedings); *Shaw v. Delo*, 971 F.2d 181, 188 (8th Cir.

Arizonans for Official English v. Arizona, ___ U.S. ___, 117 S. Ct. 1055, 1067 (1997); *Gordon v. Vasquez*, 859 F. Supp. at 415; App. C at p. 6.

1992) (since merits of unexhausted claim not properly before district court, it was appropriate to deny motion for investigative and expert services); *In re Joiner*, 58 F. 3d 143, 144 (5th Cir. 1995) (*McFarland* resolved the timing of a section 848 proceedings, not its scope. Section 848 provides counsel only for proceedings after the end of state court proceedings and there is no right to federally appointed counsel or federal fees for state court exhaustion even for unrepresented petitioner); *Christy v. Horn*, 115 F. 3d 201, 207 (3rd Cir. 1997) (although petitioner secured pre-petition appointment of counsel and stay of execution under section 848, petitioner was not entitled to a stay of execution when petition was dismissed for failure to exhaust); *Victor v. Hopkins*, 90 F. 3d 276 (8th Cir. 1996) (court cannot maintain stay of execution when mixed petition is dismissed); *McKinney v. Paskett*, 753 F. Supp. 861, 865 (D.Id. 1990) citing *In re Lindsey*, 875 F. 2d 1502, 1506 (11th Cir. 1989) (section 848 does not encompass federal payment of counsel for any state proceeding initiated in connection with the representation of a habeas petitioner in a capital case in federal court); *Coleman v. Vasquez*, 771 F. Supp. 300, 304 fn. 5 (N.D. Cal. 1991) (petitioner who seeks to exhaust claims must seek renumeration from state court); *United States ex rel. Whitehead v. Page*, 914 F. Supp. 1541,1543 (Ill. 1995) (section 848 does not authorize appointment or payment of counsel while claims are being actively reviewed by state court); *Wainwright v. Norris*, 836 F. Supp. 619, 621 (E.D. Ark. 1993) (lawyers in federal court cannot manipulate system by seeking payment for pursuing unexhausted claims in state court after filing for federal habeas relief); but see, *Hill v. Lockhart*, 992 F. 2d 801, 803 (8th Cir. 1993) (section 848 does not apply to pursuit of state collateral remedies, but arguably permits compensation for representation in state competency and clemency proceedings if state does not compensate lawyers)

By giving its imprimatur to the district court's opinion, the Ninth Circuit sanctioned a departure from the accepted and usual course of judicial proceedings sufficient to call for an exercise of this Court's supervisory power.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition for Writ of Certiorari already on file, petitioners request that the Petition for Writ of Certiorari be granted.

Dated: September 3, 1997.

Respectfully submitted,

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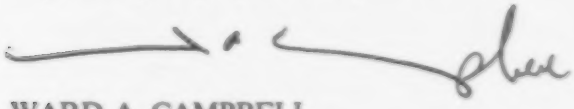

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APPENDIX "F"

(Exhibit XXIV of the "Amended Petition and/or Supplemental Pleading to Petition for Writ of Mandamus and/or Prohibition and Request for Stay of Order) filed September 19, 1994, in *Calderon v. District Court (Gordon)* (No. 94-70565))

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	C004684
	)	
Plaintiff and Appellant,	)	Crim. No. 24551
	)	
v.	)	
	)	
PATRICK BRUCE GORDON,	)	
	)	
Defendant and Appellant.	)	
	)	

AUTOMATIC APPEAL FROM THE SUPERIOR
COURT OF SACRAMENTO COUNTY

Honorable Carol Miller, Judge

DECLARATION AND REQUEST TO FILE SUPPLEMENTAL BRIEF; SUPPLEMENTAL BRIEF

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IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	C004684
	)	
Plaintiff and Appellant,	)	Crim. No. 24551
	)	
v.	)	
	)	
PATRICK BRUCE GORDON,	)	
	)	
Defendant and Appellant.	)	
	)	

DECLARATION AND REQUEST TO FILE SUPPLEMENTAL BRIEF

Michael Tanaka declares under penalty of perjury as follows:

I am a Deputy State Public Defender currently assigned to represent appellant on his automatic appeal to this Court. The opening brief was filed on March 23, 1988, almost two years ago. In that time period there have been numerous cases decided by this Court and the federal courts. Some of these cases revealed the existence of issues not previously briefed. My review of the record in preparation for oral argument and for filing a petition for writ of habeas corpus also revealed the existence of issues not previously briefed. I believe that presentation of these issues to this Court is

necessary in order to accord appellant his right to the effective assistance of appellate counsel. (See In re Smith (1970) 3 Cal.3d 192.)

WHEREFORE, declarant respectfully requests leave of this Court to file the supplemental brief which follows.

Executed at Los Angeles, California, this 12th day of March, 1990.

MICHAEL TANAKA
Deputy State Public Defender

APPENDIX "G"

(Exhibit XX of the "Amended Petition and/or Second Supplemental Pleading, Pleading to Petition for Writ of Mandamus and/or Prohibition filed September 19, 1994, and Request for Stay of Order" in *Calderon v. District Court (Gordon)* (No. 94-70565))

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PATRICK BRUCE GORDON,	Case No. CIV S-91-0822LKK
Plaintiff,	Sacramento, California Wed., September 28, 1994
vs.	
DANIEL VASQUEZ, et al.,	Motion to Vacate Stay and for Authorization of Fees and Expenses.
Defendants.	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PETER A. NOWINSKI
UNITED STATES MAGISTRATE JUDGE

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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

SACRAMENTO, CALIFORNIA, WEDNESDAY, SEPTEMBER 28, 1994

(Call to order of the Court.)

THE CLERK: Good morning, You Honor. Ward Campbell for the respondents.

THE COURT: Good morning, Mr. Campbell.

MR. KIRBY: Good morning, Your Honor. James Kirby, Seigel & Kirby for the petitioner.

THE COURT: Good morning Mr. Kirby.

Before we proceed, may I see both counsel?

(Off the record discussion)

THE COURT: Let the record reflect that in the matter of Gordon vs. Vasquez, all counsel are present in the courtroom.

I've had a lengthy discussion off the record with counsel for the parties in which counsel for the California Appellate Project has been present and participated. I've announced that it's my intent to vacate the -- or recommend to Judge Carlton that he vacate the order made quite some time ago in this case, staying the federal proceeding to allow petitioner to exhaust claims never before presented to the California court.

Also staying execution of the death sentence indefinitely while this action is proceeding, allowing a application for investigation, expenses, and the like under 21 USC Section 848(q) to be made and decided. Also, to allow the parties to conduct discovery all within the federal proceeding.

Schedule the matter for a status conference in approximately 120 days with the expectation that all necessary factual development will have been completed by that time, and at that point, look anew at the question, if there is one, whether any claims that petitioner wishes this Court to consider have been or have not been presented to the California court, and if it's appropriate, then allow exhaustion on a fully developed record, and proceed from there.

Mr. Campbell, on behalf of Respondent Vasquez has requested -- oh, let me add that that disposition then would moot the two pending requests before the Court in that because there was a federal proceeding pending, there'd be no question about the Court's jurisdiction, or the appropriateness of an order staying execution of the state death sentence pending the federal proceeding.

And second, because the -- any expenditure of monies authorized under 848(q) would occur under the supervision of the federal court during the pendency of federal habeas corpus action. There would be no arguable injury by way of insult to comity to the state court, and the state's pending writ application in the Ninth Circuit would be mooted.

Mr. Campbell has requested the opportunity to confer with others in the Attorney General's office before simply stipulating to such an order or recommendation because the matters are ones of importance to the Attorney General and certainly will recur in other cases.

Mr. Kirby has recognized that that's a fair request. If there is no objection by the Attorney General, Mr. Kirby and Mr. Campbell will cooperate in preparing an order memorializing our discussions. If there is disagreement by the Attorney General's office that Mr. Kirby cannot stipulate to an accommodation of -- the parties will advise the Court, I will prepare an order, and any offended party may take their objections to Judge Carlton.

Mr. Campbell, is that a fair synopsis of our discussion?

MR. CAMPBELL: Yes, it is Your Honor. I appreciate the opportunity to go back and reflect on whether or not there's any potential pitfalls for us that we want to think about, and we'll do it as expeditiously as possible.

Is there a possibility that we could get a transcript of how you've memorialized this agreement?

THE COURT: Certainly. Is there anything you want to add or subtract from that summary, Mr. Kirby?

MR. KIRBY: Your Honor, I think the summary is accurate. I do want to note for the record that Mr. Gordon's continuing objection to the Attorney General even being aware that we applied for funds, and obviously, that objection applies doubly to any disclosure, which I don't think there has been, of the content of that application.

Our position is that 848(q) gives us an absolute right to maintain the fact of an application itself in

confidence. What has happened before in this case has happened, but from here on out, our position is, and has been before that the fact that we have applied for funds is confidential under 848(q).

THE COURT: All right. I think that certainly the content of any application is confidential. I think Judge Carlton's publication of his order on my recommendation that the fact of an application isn't confidential is law of the case.

All right. Anything else, Mr. Campbell?

MR. CAMPBELL: No, nothing else at this time, Your Honor.

THE COURT: Mr. Kirby?

MR. KIRBY: That's fine, Your Honor. Thank you.

THE COURT: All right. Court's adjourned.

(Whereupon the hearing in the above-entitled matter was adjourned.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

_____ September 28, 1994

Patricia A. Petrilla,
Transcriber